NO. 20928

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE PETER THEOBALD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MANUEL L. REAL,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Constitutions

Codes and Statutes

Texts

Rules

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, following a jury trial [C. T. 2-4, 52]. 1/

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

1/ "C. T." refers to the Clerk's Transcript of Record.

II

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that beginning at a date unknown to the Grand Jury and continuing to on or about April 13, 1963, appellant, unindicted co-conspirator Martin Stuart Gold, and divers other persons agreed, confederated, and conspired together to commit offenses against the United States, namely, knowingly and with intent to defraud the United States, to import and bring marihuana into the United States from Mexico, and to smuggle and clandestinely introduce marihuana into the United States from Mexico, without presenting said marihuana for inspection and without entering and declaring said marihuana, and to conceal, transport, and facilitate the concealment and transportation of marihuana which had been imported into the United States contrary to law, such conspiracy being in violation of Title 21, United States Code, Section 176a. Two overt acts were alleged [C. T. 2-3].

Count Two charged that Martin Stuart Gold, with intent to defraud the United States, knowingly smuggled and clandestinely introduced approximately 44 pounds of marihuana into the United States from Mexico, and that appellant knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C. T. 4].

Appellant filed a Notice of Motion For Statement of

Evidence Favorable to Defendant If Material To The Issue of Guilt, dated May 14, 1964 [C. T. 11]. Appellee filed an extensive response to this request [C. T. 14-16].

Jury trial of appellant commenced on May 19, 1964, before United States District Judge Fred Kunzel, and appellant was found guilty as charged on May 21, 1964 [C. T. 17, 26].

Appellant subsequently jumped bail, his bond was forfeited, and a bench warrant was issued [C. T. 51].

On October 22, 1965, appellant's motion for a new trial was denied, and he was sentenced to the custody of the Attorney General for a period of five years on each count, to run concurrently [R. T. 3, 5]. 2/

Later that day, after being advised that appellant's conviction in a state case had been reversed upon appeal upon the grounds of illegal search and seizure and unlawful arrest, 3/ and after hearing additional argument, the Court granted the motion for new trial and vacated the sentence [R. T. 11-12].

Appellant's second jury trial commenced on November 18, 1965, before Judge Kunzel [R. T. 17]. Appellant was found guilty as charged on November 24, 1965 [C. T. 52]. The jury deliberated for 50 minutes [R. T. 326, 328]. At the first trial the jury deliberated for 47 minutes [C. T. 26].

2/ "R. T." refers to the Reporter's Transcript. Since there is some repetition in the numbering of the pages, any reference to the first trial will be specially noted in this brief.

3/ People v. Theobald, 231 Cal. App. 2d 351 (1964).

Thereafter, on December 17, 1965, appellant was sentenced to the custody of the Attorney General for a period of five years on each count, to run concurrently, with a recommendation that the Georgia State Prison be designated as the place of confinement under the sentence [C. T. 80].

Appellant thereafter filed a timely notice of appeal [C. T. 81].

III

ERROR SPECIFIED

Appellant's opening brief lists the following points upon appeal (at pp. 4-5):

> "(1) Appellant urges that the trial court erred in admitting the testimony of Government witness, RONNA ADRIAN, offered in an attempt to prove that appellant had agreed to sell, but had not in fact sold marihuana at a time prior to April 3, 1963.(R. T. 147-159).
>
> "(2) Appellant urges that the trial court erred in not giving to the jury a cautionary instruction limiting the effect of the testimony of the witness, RONNA ADRIAN. (R. T. 299-324, at 319).
>
> "(3) Appellant urges that the trial court erred in admitting, over appellant's objection, evidence secured as the result of an illegal search and seizure

occurring on April 19, 1963. (R. T. 165, 176-182, 196-198).

"(4) Appellant urges that the trial court erred in denying appellant's motion to suppress as evidence a physical object, to wit: an address book, seized by officers as a result of an illegal search and seizure at appellant's residence on April 19, 1963. (R. T. 165, 176-182, 196-198)."

IV

STATEMENT OF THE FACTS

Appellant had a conversation with Martin Gold a few weeks prior to April 13, 1963, and subsequently met Gold in Mexico, where they transferred marihuana into a vehicle operated by Gold. Gold transported the marihuana to Los Angeles and took it to appellant's house [R. T. 100-101].

Later, on April 13, 1963, appellant and Gold met in a coffee shop in Hollywood and appellant asked Gold to go to Tijuana, Mexico, as appellant planned to buy some marihuana. Gold agreed to drive to Tijuana alone and wait for appellant there [R. T. 97-99].

On the same day appellant borrowed a 1958 Ford automobile from Michele Restuccia, having stated that he wanted to use the vehicle to go to Lancaster to move some furniture and look at some property [R. T. 138-139].

Appellant told Gold to use Restuccia's vehicle and gave him

the key. Gold obtained the car at a restaurant in Hollywood [R. T. 104, 130-132]. Appellant and Gold met in Tijuana and drove their two vehicles to a side road, where they transferred marihuana from appellant's vehicle to the one operated by Gold. Gold then drove alone across the international border into San Diego County, California, and was arrested on the same date, April 13, 1963 [R. T. 65-66, 99-100].

When he entered the United States, Gold stated that he had nothing from Mexico. He was asked to open the trunk of the vehicle and stated that his friend had the trunk key. A Customs inspector found 44 pounds of marihuana under the seats of the vehicle [R. T. 66, 68, 70, 71, 137]. The marihuana had a value of approximately $1100 in Tijuana, Mexico [R. T. 175].

About three days later appellant told Restuccia that the Ford had ended up in the hands of the Government, that Restuccia had lost the car, that appellant felt responsible, and that appellant would reimburse Restuccia $500 or $600 for the loss [R. T. 139-140].

On April 19, 1963, Los Angeles City Police Sergeant D. W. Beckmann, two Customs agents, and two other city officers went to appellant's residence on Weepah Way in Hollywood [R. T. 163, 183, 185, 193]. Sergeant Beckmann had been informed by Sergeant Raymond Camacho of the same detail that Martin Gold was selling marihuana for appellant [R. T. 184, 187]. He also had been informed by Deputy Sheriff Joe Lesnick that appellant was dealing in marihuana from his Weepah Way residence [R. T. 184, 185, 196].

Furthermore, he knew that appellant had been arrested in March with six pounds of marihuana and six or seven pounds of peyote, and he knew the details of Gold's arrest at San Ysidro and information given to Customs Agent Neil Greppin by persons arrested by him [R. T. 184, 187]. 4/

The officers had no warrant of arrest and no search warrant. The purpose of the visit was to talk to appellant. The five officers surrounded the house [R. T. 187-188, 193].

Appellant answered the officers' knock upon the door. Several people were sitting in the living room. After the officers identified themselves, an individual named Taylor grabbed a white object from the table next to him and ran into the bedroom [R. T. 185, 190]. Sergeant Beckmann, believing that Taylor was going to dispose of contraband, having taken into consideration his own past experiences and observations as a narcotics investigator for approximately 10 years, forced his way through the door and recovered marihuana in the bedroom into which Taylor had run. Additional marihuana was found in the ivy outside of the premises. The marihuana in the bedroom was not in Taylor's possession [R. T. 185, 190, 195].

Sergeant Beckmann arrested appellant. After the arrest he picked up Government Exhibit 7 for Identification (a telephone book) and other papers [R. T. 167-168, 191-192]. Government Exhibit 7 for Identification was not received in evidence at the

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4/ The testimony summarized in this paragraph was heard outside of the presence of the jury.

trial [R. T. 342]. Appellant testified that the exhibit looked like his wife's telephone book [R. T. 239].

Appellant stated to the officers that he did not know Michele Restuccia, did not know Martin Gold, and had gone shopping with his wife on April 13, 1963. He also stated that he had borrowed a vehicle on April 14 but would not name the person from whom he borrowed it [R. T. 75-76, 165-166].

Appellant testified at the trial and claimed innocence. He admitted knowing Restuccia and Gold [R. T. 227-228]. He admitted that he had told Gold on April 13 that he could use Restuccia's Ford. He denied having later offered to pay Restuccia for the loss of the Ford, and he denied having told officers that he went shopping with his wife on April 13. He admitted two felony convictions [R. T. 227-228, 235-236, 240].

Ronna Adrian testified that in April, 1963, she discussed with appellant the purchase of some marihuana from him, and she believed that the delivery was to take place later and believed that the purchase was not completed because of the arrests that happened [R. T. 151-152, 157-158]. She admitted a felony conviction and stated that she was on parole and believed that her testimony would have no effect upon her parole. Adrian was on state, not federal parole [R. T. 152, 154-155, 158].

Gold, who had testified concerning appellant's conversations and subsequent activities in Mexico, admitted that he had told the officers on the date of his arrest that he knew nothing about the marihuana and told them that he had borrowed the vehicle from

Restuccia [R. T. 106, 112]. There was evidence that Gold testified at his own trial, in his own defense, in contradiction to his testimony in the instant case. Gold's testimony also was contradicted by that of Michael De Carlo, who was in a mental institution at the time of trial [R. T. 113-114, 116, 118-119, 198, 201].

Gold was convicted at his own trial and sentenced to seven years in prison. This was later reduced to five years [R. T. 119, 123].

Mrs. Dickie Huggins was another missing witness for appellant. Since she could not be located, her testimony from appellant's prior trial was read into the record. She testified that she had been shopping with appellant for 4 or 4-1/2 hours on the afternoon of April 13, 1963, and that appellant had stated that he didn't have a car [R. T. 224-226].

V

ARGUMENT

A. THE TESTIMONY OF WITNESS RONNA ADRIAN WAS PROPERLY ADMITTED.

Appellant asserts that the trial Court committed error in admitting the testimony of witness Ronna Adrian. He contends that the evidence was highly prejudicial and irrelevant.

Appellant was charged with a conspiracy to smuggle, conceal, transport, and facilitate the concealment and transportation of marihuana. It was alleged that the conspiracy commenced at an

unknown date and continued to on or about April 13, 1963. It was alleged that appellant conspired with Martin Stuart Gold "and divers other persons to the Grand Jury unknown . . ." [C. T. 2-3].

Ronna Adrian testified that "around that time" in April, 1963, she discussed with appellant the purchase of some marihuana from him, and she believed that the delivery was to take place later and believed that the purchase was not completed because of the arrests that happened [R. T. 151-152, 157-158]. Appellant was arrested on April 19, 1963 [R. T. 74, 77-78]. 5/

The jury could justifiably conclude that the offer to sell marihuana to Ronna Adrian was "on or about April 13, 1963", 6/ that it was part of the alleged conspiracy to "conceal, transport and facilitate the concealment and transportation of marihuana", and that Ronna Adrian was one of the conspirators listed as "divers other persons to the Grand Jury unknown . . .". Since the 44 pounds of marihuana obviously were imported for purposes of sale, purchasers were necessary in order to avoid a failure of the conspiracy.

Consequently, the evidence concerning an offer to sell marihuana was proper evidence of appellant's commission of the

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5/ The fact that appellant also was arrested on March 5, 1963 [FIRST TRIAL R. T. 383] apparently was not before the jury in this trial.

6/ Appellant's counsel stated that he believed that all events mentioned in the testimony at trial occurred prior to April 19, 1963 [R. T. 265]. He concedes in his brief that the Adrian testimony refers to events occurring prior to April 13, 1963 [Appellant's Opening Brief, p. 4].

crime charged (i. e., conspiracy) rather than commission of "other offenses" as suggested by appellant and the rule of law upon which he relies.

> "It should be borne in mind that in a conspiracy case wide latitude is allowed in presenting evidence and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged."
>
> Schino v. United States, 209 F. 2d 67, 74 (9th Cir. 1953).

Assuming, arguendo, that the offer to sell constituted an independent crime, the evidence was properly admitted.

Evidence of other crimes may be admissible to show knowledge, intention, absence of mistake or accident, and to prove the crime charged.

Teasley v. United States, 292 F. 2d 460, 467 (9th Cir. 1961);

Anthony v. United States, 256 F. 2d 50, 53 (9th Cir. 1958).

In Teasley, supra, the appellant was charged with sale, concealment, transportation, and facilitation of concealment, transportation, and sale of heroin. This Court approved the ruling of the trial court permitting introduction of a partially-smoked marihuana cigarette and a white powder found in appellant's apartment, which was away from the scenes of the alleged crimes (at pp.

463, 466-467).

In Anthony, supra, where the appellant was charged with sale and facilitation of sale of marihuana, evidence was introduced showing that two bags of marihuana were found in the appellant's vehicle a few minutes after he participated in the sale of marihuana. The evidentiary ruling was approved upon appeal.

In Wright v. United States, 192 F. 2d 595 (9th Cir. 1951), where the appellant was charged with possession of marihuana, this Court approved (at p. 597) the ruling of the trial court permitting introduction of evidence of the appellant's possession of marihuana and dealing in marihuana at a time previous to the date of the alleged crime.

In Ng Sing v. United States, 8 F. 2d 919, 920 (9th Cir. 1925), this Court held that the fact of sale of opium might have a tendency to establish a charge of possession of opium.

It has been held that evidence that a defendant smoked marihuana in the past is admissible where the charges are smuggling and concealing marihuana.

Klepper v. United States, 331 F. 2d 694, 698-99 (9th Cir. 1964).

It also has been held that where the charges involve alleged opium crimes, evidence of an appellant's possession of opium and yen shee near the scene of the alleged crime was admissible to show guilty knowledge.

Stein v. United States, 166 F. 2d 851, 855 (9th Cir. 1948).

Evidence that a defendant smoked opium is relevant and admissible upon a charge of manufacturing opium.

Tam Shi Yan v. United States, 224 Fed. 422 (2nd Cir. 1915).

In Nolan v. United States, 31 F. 2d 426, 427 (9th Cir. 1929), where the defendant was charged with unlawful possession and manufacture of liquor, unlawful possession of property designed for the manufacture of liquor, and maintenance of a nuisance, it was held that evidence was properly received that on about 10 different occasions the defendant delivered liquor in jugs to a taxi driver. This Court stated:

> "This testimony, no doubt, tended to show the commission of other crimes; but, if it also tended to show the commission of the crimes charged in the information, the appellant cannot complain, and the testimony clearly had some tendency in that direction." (at p. 427).

In Cohen v. United States, 124 F. 2d 164 (2nd Cir. 1941), the defendants were charged with concealing, transporting, and facilitating the concealment and transportation of morphine. They argued that the court committed error by permitting evidence of manufacture and sale of narcotics. The Court of Appeals rejected the argument:

> "The argument that the admission of proof of manufacture and sale of narcotics was improper, when

the charge only related to possession, has no reasonable basis. The evidence of manufacture and sale necessarily tended to prove possession for the very purpose of a later sale." (at p. 166, emphasis added).

In the instant case, the evidence of offer to sell had the same tendency to prove the motive for possession.

In Teasley, supra, 292 F.2d 460, where the defendant was charged with heroin offenses, evidence of his possession of a partially-smoked marihuana cigarette was received over objection. This Court affirmed the conviction, although the relationship of marihuana and heroin is sufficiently remote to conclude that the merits were far more favorable to the appellant in Teasley than in the instant case, with its close relationship between a conspiracy to transport, etc., marihuana and an offer to sell marihuana, which would necessarily involve an offer to transport the same.

Teasley, supra, is mentioned without criticism in Enriquez v. United States, 314 F.2d 703, 717 (9th Cir. 1963), so it is evident that Enriquez was not intended to overrule Teasley. In Enriquez this Court held that evidence of previous possession or use of marihuana was not admissible to show intent to sell heroin.

Enriquez is the only decision cited by appellant upon the point in question. Appellant states:

"Here, as in the Enriquez case, there is no similarity between the act charged with the antecedent act."

(Appellant's Opening Brief, p. 22).

Actually, Enriquez is excellent authority in support of the ruling of the trial Court herein. Speaking for the Court in that opinion, Judge Barnes stated:

> "There is no question but that on the limited issue of intent, it is not error to permit the introduction of evidence as to the prior possession of heroin by any defendant charged with possession, transportation or sale of heroin, or facilitating such possession, transportation or sale." (at p. 713, emphasis added).

The opinion also states (at p. 714) that proof of previous sale of marihuana might be admissible to show intent to sell heroin (at p. 714).

Teasley, supra, also notes the general rule that evidence of another crime is admissible "to prove the crime charged" (at p. 467).

The evidence also was admissible to show motive.

Cohen v. United States, supra;

Moore v. United States, 150 U.S. 57 (1893).

> "Evidence of the motive which suggests the doing of the act constituting the crime charged is always admissible, and this is true even though such evidence tends to show the commission of another crime, or constitutes proof of the commission of another crime." I Wharton's Criminal Evidence (12th Ed.) 529-30 (Section 239).

"Proof of other crimes similar in nature is admissible to show motive and intent."

Babb v. United States, 351 F.2d 863, 867 (8th Cir. 1965).

The evidence of the offer to sell marihuana not only was admissible as evidence of commission of the crime charged, admissible to show motive, and admissible to show intent, but it also was admissible as having a natural tendency to corroborate or supplement direct evidence (i.e., Gold's testimony).

"An exception to the rule which excludes evidence of other offenses is made in those cases in which the evidence offered has a natural tendency to corroborate or supplement admitted evidence. . . ."

Hass v. United States, 31 F.2d 13, 15 (9th Cir. 1929).

The same rule appears in Schwartz v. United States, 160 F.2d 718, 721 (9th Cir. 1947).

As an indication that Ronna Adrian's testimony was highly prejudicial to appellant, appellant notes that she had been arrested in connection with marihuana. The fact of the arrest was introduced into the record by appellant, not by appellee [R. T. 154].

Appellant states that the indication that he was a marihuana peddler would be extremely shocking to the jury. However, the rules regarding admissibility of evidence of other crimes are not affected by the seriousness of those other crimes. This Court

has upheld admission of evidence of sales of narcotics or marihuana where the charges were limited to non-commercial offenses.

Wright v. United States, supra;

Ng Sing v. United States, supra.

The Supreme Court has extended the rule to include evidence of murder, a crime much more shocking than an offer to sell marihuana. In Moore, supra, the evidence of the unalleged crime tended to show murder with the additional disgusting fact that the defendant's brother was wearing boots taken from the murdered man. The Supreme Court unanimously ruled that the evidence was admissible to show motive.

Before leaving the subject, it should be noted that admissibility of evidence of unalleged crimes is not affected by the fact that the unalleged crimes may be subsequent to the alleged crimes.

Teasley v. United States, supra, at 467;

Anthony v. United States, supra, at 53.

It also should be noted that where the evidence is admissible it may be offered by the prosecution without waiting for the defense to specifically interject the issue, such as lack of intent, lack of knowledge, etc.

Hamman v. United States, 340 F.2d 145, 149 (9th Cir. 1965).

In conclusion, it is respectfully submitted that the trial Court's ruling upon the questioned evidence was entirely consistent with numerous decisions of this Court and was not in any way inconsistent with the only decision cited by appellant as authority for

his position.

B. THE TRIAL COURT DID NOT COMMIT ERROR BY FAILURE TO GIVE A CAUTIONARY INSTRUCTION TO THE JURY.

Appellant contends that the trial Court committed error by failing to give a cautionary instruction in regard to evidence of appellant's offer to sell marihuana to Ronna Adrian. Although a cautionary instruction was given [R. T. 320], appellant argues that the instruction numbered 4.08 in 27 Federal Rules Decisions 80 should have been given.

However, Instruction 4.08 does not apply to the facts of the instant case. This instruction includes the following paragraph:

> "Nor may evidence of alleged earlier acts of a like nature be considered for any other purpose, unless the jury first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular acts charged in the particular count of the indictment -- information then under deliberation." (Emphasis added).

Appellant was charged in Count One with conspiracy and in Count Two with aiding, abetting, etc. Had the suggested instruction been given, the jurors would have been told that they could not consider Ronna Adrian's testimony unless they first

found that the other evidence, standing alone, established beyond a reasonable doubt that the accused conspired and aided and abetted (i.e., "did the particular acts charged in the particular count of the indictment -- information . . ."). In other words, they could not consider the evidence until they first found the defendant guilty as charged. This would be an absurd instruction. There would be no need for the additional evidence if the jury was required to decide all basic issues in the case before considering the additional evidence. It is obvious that this instruction was not intended to apply in conspiracy cases. Furthermore, appellee has been unable to locate a single case holding that the instruction is required if it does apply to the factual situation. Enriquez v. United States, supra, involves a similar instruction, but it does not appear that the decision is authority for the proposition that the instruction is a proper one.

Appellant has failed to comply with Rule 30 of the Federal Rules of Criminal Procedure, which provides in part as follows:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (Emphasis added).

Appellant did not "distinctly" state his position in the trial Court. He did request Instruction 4.08 and then immediately criticized the same instruction:

"THE COURT: Well, which do you want?

"MR. STEWARD [7]: 4.08, your Honor, is what we would request. Although actually it wasn't an act of a similar nature. There is no connection between conspiracy to smuggle marijuana and a proposed sale of marijuana." [R. T. 245].

If it be assumed, arguendo, that the general philosophy of Instruction 4.08 is applicable to conspiracy and aiding and abetting charges, then the proper instruction would have been Instruction 4.07 at 27 Federal Rules Decisions 79. Both instructions refer to intent and are not concerned with motive or other matters. Instruction 4.07 involves evidence of an earlier offense of a like nature, while Instruction 4.08 involves evidence of an earlier act of a like nature. This is the primary distinction between the two instructions. The evidence in the instant case involved an offense, since an offer to sell marihuana constitutes a felony under California Health and Safety Code Section 11531. Consequently, assuming the applicability of either Instruction 4.07 or Instruction 4.08, the former would be the proper instruction. However, appellant not only failed to request Instruction 4.07 but actually rejected it:

"THE COURT: You don't want 4.07?

"MR. STEWARD: No, because as your Honor points out it is not of a same or similar nature.

7/ Counsel for appellant.

"THE COURT: Well, this is 4.08. I am talking about 4.07.

"MR. STEWARD: Same or similar offense. One uses the word 'offense' and the other one 'act'.

"THE COURT: Yes.

"MR. STEWARD: But they are both having to do with same or similar offense or same or similar act.

"THE COURT: No. 4.07 doesn't. You can leave out that 'of like nature' but you understand juries, I think, better than most of us.

"MR. STEWARD: I thank your Honor for your kind words, and I wish it were true.

"Beyond, what I have stated, your Honor, we would have no objections to the instructions your Honor had indicated." [R. T. 250].

Prior to this colloquy, as already indicated, counsel for appellant had requested Instruction 4.08 and then criticized the instruction in the same breath [R. T. 245]. Shortly afterwards, he stated as follows:

"Well, I hate to highlight the testimony, but then again I think the jury should be advised that he is not on trial for anything other than conspiracy to smuggle marijuana, and that any other act, any evidence of anything else, he is not on trial for that." [R. T. 248].

An instruction upon this point was given [R. T. 317]. After this request, appellant's counsel turned down the Court's suggestion that he frame an instruction [R. T. 248]. He later stated:

> "Well, not seeing an instruction that I feel covers the matter, I won't make any further requests, your Honor." [R. T. 250].

This statement would naturally lead the Court to believe that appellant was not requesting Instruction 4.08. This conclusion is supported by subsequent events. After the instructions were given, appellant's counsel objected to the instructions upon the ground that the testimony of Ronna Adrian had "nothing to do with an intent . . ." [R. T. 325]. However, Instruction 4.08, which appellant now prefers, is an instruction upon intent.

Furthermore, at the hearing of the motion for judgment of acquittal or motion for a new trial, the following colloquy occurred in regard to a cautionary instruction relating to Ronna Adrian's testimony:

> "THE COURT: I don't recall that any was offered.
>
> "MR. STEWARD: Well, there is no question but what none was offered because I recall we had quite a colloquy here, both before the instructions and I believe there after the instructions were given, concerning this particular instruction, and I know that your Honor invited me to submit one, and I was of the opinion then

and now that there wasn't much that I could do about it.

"THE COURT: No, and you didn't want me to.

"MR. STEWARD: Yes.

"THE COURT: And as I recall I did ask you to draft one.

"MR. STEWARD: Yes, you did, your Honor, and I took the position that I didn't know how you could cover, say, anything that could occur that I felt was an error at the time, and Mr. Johnson didn't submit anything." [R. T. 340, emphasis added].

It is clear that appellant failed to comply with the provisions of Rule 30. While there may be exceptions to these requirements in rare cases, it is respectfully submitted that this is not a case of "plain error" excusing failure to comply with Rule 30. Rule 52 of the Federal Rules of Criminal Procedure provides as follows:

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In reference to Rule 52, this Court has stated:

" 'Plain' means 'clearly or plainly apparent' and in this sense it has been stated that what is plain

can be seen at the first glance without search or study."

Percifield v. United States, 241 F.2d 225, 228 (9th Cir. 1957).

Considering that appellant requests the wrong instruction, that it is highly probable that the basic philosophy of either instruction would not apply in conspiracy cases, that appellant apparently withdrew the request (subsequently admitting that he requested no instruction upon the subject), it is evidence that this is not a case of "plain error" that is "clearly or plainly apparent" and "can be seen at the first glance . . .". Indeed, it does not appear to involve error at all.

C. EVIDENCE OBTAINED AT APPELLANT'S RESIDENCE WAS NOT UNLAWFULLY OBTAINED.

Appellant contends that he was unlawfully arrested on April 19, 1963, and that certain statements and a telephone book (Government Exhibit 7 for Identification) should not have been received in evidence. Actually, the telephone book was not received in evidence [R. T. 342]. After it was mentioned by Sergeant Beckmann, it was actually produced in court and marked for identification at the instigation of appellant's counsel [R. T. 165, 167-168].

Appellant's arrest occurred after the officers went to his house to talk to him [R. T. 188]. Sergeant Beckmann, who made the actual entry after observing Taylor's flight, had been informed

by Deputy Sheriff Lesnick that appellant was dealing in marihuana from his residence [R. T. 184, 185, 196]. He had been informed by Sergeant Camacho that Martin Gold was selling marihuana for appellant [R. T. 184, 187]. He also knew that appellant had been arrested in March with six pounds of marihuana and six or seven pounds of peyote, and he knew the details of Gold's arrest at San Ysidro and information given to Customs Agent Greppin by persons arrested by him [R. T. 184, 187].

When appellant answered the officers' knock upon the door, Taylor, one of several people sitting in the living room, grabbed a white object from the table next to him and ran into the bedroom [R. T. 185, 190]. Sergeant Beckmann forced his way through the door, ran into the bedroom, and recovered marihuana there. It was not in Taylor's possession. Additional marihuana was found in the ivy outside of the premises [R. T. 185, 190, 195].

Sergeant Beckmann arrested appellant and then picked up the telephone book in question [R. T. 167-168, 191-192]. He mentioned the telephone book in his testimony, stating that appellant denied knowing Restuccia and Martin Gold, that he told appellant that the names of Restuccia and Gold were in the telephone book, and that appellant denied this [R. T. 165-166].

Sergeant Beckmann also testified that appellant stated that he had gone shopping with his wife on April 13, 1963, and that he had borrowed a vehicle on April 14 but would not name the person from whom he borrowed it [R. T. 75-76, 165-166].

In considering the legality of appellant's arrest, special

weight must be given to the law of California. The Supreme Court of the United States has held that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity".

United States v. Di Re, 332 U.S. 581, 589 (1948).

Although Mapp v. Ohio, 367 U.S. 643 (1961), applied Fourth Amendment standards to the states, the Di Re ruling is one of those standards, and it refers the matter to state law. Furthermore, Mapp "implied no total obliteration of state laws relating to arrests and searches in favor of federal law".

Ker v. California, 374 U.S. 23, 31 (1963).

Consequently, had Agent Greppin, a federal officer, controlled the arrest decision, Di Re would refer the matter to state law, as there appears to be no applicable federal statute concerning probable cause for an arrest by a Customs officer. 8/ However, it was a state officer who forced the entry and made the arrest [R.T. 185, 191-192], so there is additional compelling reason to refer to the law of California. Reference also will be made to Federal decisions to demonstrate that the actions of the officers were entirely reasonable and lawful under the state and federal decisions.

Before going to appellant's home for purposes of questioning,

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8/ 19 U.S.C.A. 1581 refers to arrest by Customs officers but does not mention probable cause or reasonable cause.

26 U.S.C.A. 7607, referring to arrests by Bureau of Narcotics agents, does not apply to Customs.

Sergeant Beckmann had been informed by Deputy Sheriff Lesnick that appellant was dealing in marihuana from his home. This fact alone constituted reasonable cause to arrest without a warrant. An officer is a reliable informant.

People v. Lopez, 196 Cal. App. 2d 651 (1961).

An arrest may be based upon information provided by a single reliable informant.

People v. Garnett, 148 Cal. App. 2d 280, 284 (1957);

Trowbridge v. Superior Court, 144 Cal. App. 2d 13, 22-23 (1956).

A California peace officer may arrest "Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed".

California Penal Code Section 836.

"California courts are very liberal in essaying the acts which constitute probable cause."

United States v. Bell, 48 F. Supp. 986, footnote at 993 (S. D. Cal. 1943).

It is entirely proper for officers to go to the residence of a suspect in order to question him.

People v. Torres, 56 Cal. 2d 864, 867 (1961);

People v. Michael, 45 Cal. 2d 751, 754 (1955);

Davis v. United States, 327 F. 2d 301 (9th Cir. 1964).

The fact that five officers were involved does not affect the validity of their visit. In People v. Michael, supra, four officers from three different agencies went to the home of the suspect, a

female, in order to interview her. This conduct was held to be proper.

The fact that appellant's home was surrounded also is not significant. It is common knowledge that officers are subjected to frequent assault in Los Angeles County. There is no evidence that the officers hoped that the interview would be productive of the discovery of physical evidence. However, even if they did have optimistic hopes, their conduct would not be unreasonable.

Davis, supra, at 303.

As previously noted, the information given to Sergeant Beckmann by Deputy Sheriff Lesnick alone constituted sufficient cause for an arrest had Sergeant Beckmann been so inclined. However, he also had additional information of considerable consequence, provided by Sergeant Camacho (that Gold was selling marihuana for appellant) and by Agent Greppin. When he saw Taylor grab a white object and flee after the officers identified themselves, he was entirely justified in his conclusion that Taylor was planning to dispose of contraband, which conclusion took into consideration his own past experiences and observations as a narcotics investigator for approximately ten years [R. T. 190].

At this point, Sergeant Beckmann had reasonable cause to arrest both Taylor and appellant. The court found that there was probable cause [R. T. 197]. The entry was necessary in order to arrest appellant and prevent the disposal of contraband.

A forcible entry may be made without announcing the purpose of entry where there is a risk of disposal of contraband.

People v. Hammond, 54 Cal. 2d 846, 854 (1960);

People v. Torres, supra, 56 Cal. 2d 864, 866-67 (1961), cert. denied, 369 U. S. 838 (1962);

Ker v. California, supra, 374 U. S. 23, 37-41.

In Ker, the officers legitimately feared disposal of contraband and entered without permission or announcement although no one was seen to flee to another part of the apartment. Their conduct was considered to be reasonable. In Torres, supra, the officers sent to the suspect's home to interview her, entered, pursued a woman in flight toward the bathroom, and seized suspected narcotics. Their conduct was upheld by the appellate court.

The discovery of marihuana in the bedroom resulted from a search incident to Taylor's arrest. While it is not clear whether the arrest preceded or followed the search, this is immaterial under California law so long as there is reasonable cause to arrest at the time of the search.

People v. Torres, supra;

People v. Luna, 155 Cal. App. 2d 493, 495 (1957).

This Court also has held that where there is probable cause for an arrest without a warrant, it is immaterial that the search precedes the arrest.

Busby v. United States, 296 F. 2d 328, 332 (9th Cir. 1961), cert. denied, 369 U. S. 876 (1962);

Fernandez v. United States, 321 F. 2d 283, footnote at 287 (9th Cir. 1963). 9/

The validity of the seizure of the marihuana is not affected by the fact that the white object which was sought probably was not contraband. Officers may seize contraband found during a valid search involving a separate alleged crime.

People v. Shafer, 183 Cal. App. 2d 127, 129 (1960).

Evidence is not rendered inadmissible by the fact that it is evidence of a different crime than the one suspected at the time of arrest and search.

People v. Dickenson, 210 Cal. App. 2d 127, 135 (1962). An entry that is lawful and reasonable when it occurs does not change its character and become evil because it is later discovered that the officer's reasonable belief was erroneous.

Ker, supra, footnote 12 at pp. 40-41.

Officers who make a valid entry upon property may seize contraband although they were not aware that such property was on the premises when the search was initiated.

Harris v. United States, 331 U.S. 145, 155 (1947).

Appellant relies upon Wong Sun v. United States, 371 U.S. 471 (1963). However, in Wong Sun the officers had no reason to believe that they were at the residence or place of business of the suspect. They were looking for " 'Blackie Toy', proprietor of a

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9/ Of course, if the marihuana was in open view in the bedroom, there was no "search". Appellant did not meet his burden of proof here and possibly does not contest this point.

laundry on Leavenworth Street." (at p. 473). The informant, who was not known to be reliable, gave information which "merely invited the officers to roam the length of Leavenworth Street (some 30 blocks) in search of one 'Blackie Toy's' laundry -- and whether by chance or other means (the record does not say) they came upon petitioner Toy's laundry, which bore not his name over the door, but the unrevealing label 'Oye's' " (at pp. 480-81). Thus mere flight in Wong Sun did not provide probable cause. The facts of the instant case are entirely different. Not only was there a vast amount of probable cause in regard to appellant's criminal activities, but there also was the grabbing of the white object when the flight commenced.

Since the marihuana that was found in the bedroom of appellant's home was not in Taylor's possession, although he had a white object which was not contraband [R. T. 195], the officers had additional reasonable cause to arrest appellant for possession of marihuana.

Davis, supra, at 306.

Since appellant's arrest was lawful, his exculpatory false statements were admissible in evidence.

Assuming, for purposes of argument only, that the arrest of appellant was unlawful, it does not necessarily follow that his exculpatory statements constituted the "fruit" of the arrest. Not every statement made by an arrested person shortly after his unlawful arrest is the product of the arrest.

Burke v. United States, 328 F. 2d 399, 402 (1st Cir.

1964);

Hollingsworth v. United States, 321 F. 2d 342, 350-51 (10th Cir. 1963);

United States v. Zimple, 318 F. 2d 676, 680 (7th Cir. 1963), cert. denied, 375 U. S. 868 (1963).

Furthermore, even if it be assumed, arguendo, that the arrest of appellant was unlawful and that the statements constituted the product of the arrest, it is respectfully submitted that appellant waived his objection by failure to object until November 22, 1965, more than 2-1/2 years after the arrest. When the testimony concerning the same statements was offered at the first trial, on May 20, 1964 [R. T. 470-72, first trial], there was no objection. Appellant earlier had made a general objection to evidence of one of these statements, without making any reference to legality of the arrest [R. T. 459, first trial].

Unless extenuating circumstances exist, an objection to an alleged unlawful search is waived by failure to make a timely motion to suppress evidence.

Sandez v. United States, 239 F. 2d 239, 242 (9th Cir. 1956).

There are no extenuating circumstances here.

D. THE TELEPHONE BOOK WAS PROPERLY SEIZED AS AN INSTRUMENTALITY OF CRIME.

Appellant contends that regardless of the legality of the officer's entry and the arrest, the address book or telephone book (Government Exhibit 7 for Identification) was illegally seized because it constituted mere evidence and was not subject to seizure as incident to an arrest.

It is respectfully submitted that the book was subject to seizure as an instrumentality of crime. It contained the names of co-conspirator Gold and of Restuccia. The vehicle employed in the smuggling was obtained from Restuccia [R. T. 138-39, 165-66]. Since it was vitally necessary for appellant to have a means of contacting Gold and Restuccia, the telephone book was an instrumentality of the crime.

Things connected with a crime as the means by which it was committed are subject to search and seizure incident to an arrest without a warrant.

Agnello v. United States, 269 U. S. 20, 30 (1925).

The California Supreme Court has upheld the seizure of a telephone directory sheet with names and telephone numbers of victims as a seizure incident to a lawful arrest.

People v. Winston, 46 Cal. 2d 151, 155, 162-63 (1956).

It is respectfully submitted that the trial Court was correct in ruling [R. T. 345-46] that the telephone book was an instrumentality of crime.

E. ASSUMING, ARGUENDO, THAT THE EXHIBIT IN QUESTION WAS NOT AN INSTRUMENTALITY OF CRIME, IT WAS NEVERTHELESS SUBJECT TO SEIZURE.

If it be assumed, for purposes of argument, that the telephone book was not an instrumentality of crime, it was subject to proper seizure as evidence.

> "When one is lawfully arrested, all property found on his person or in his control, which may tend to prove the offense with which he is charged, may be seized and held as evidence against him."
>
> Varon, Searches, Seizures and Immunities, Vol. I, p. 192.

> "The principal purpose of the search is to discover evidence of criminal conduct, and the right to search depends on the validity of the arrest."
>
> Witkin, California Criminal Procedure, p. 109 (Emphasis added).

Items which are merely evidentiary may be seized incident to a lawful arrest.

Morales v. United States, 344 F. 2d 846, 851 (9th Cir. 1965);

Taglavore v. United States, 291 F. 2d 262, 265 (9th Cir. 1961);

Charles v. United States, 278 F. 2d 386, 388 (9th Cir. 1960);

Sayers v. United States, 2 F. 2d 146, 147 (9th Cir. 1924);

Shettel v. United States, 113 F. 2d 34, 35 (C. A. D. C. 1940);

Moder v. United States, 64 F. 2d 703, 704 (C. A. D. C. 1933);

Estabrook v. United States, 28 F. 2d 150, 153 (8th Cir. 1928);

Maynard v. United States, 23 F. 2d 141, 144 (C. A. D. C. 1927);

United States v. Bell, 48 F. Supp. 986, footnote at 997 (S. D. Cal. 1943).

" 'The right of search extends to the premises in control of the defendant arrested, and authorizes the seizure of that which is evidentiary of the crime.' "

Morales, supra, at 851.

"In any such search, not only may the instruments and fruits of crime be seized, but mere evidentiary articles, including papers incidentally discovered, may be likewise seized."

Sayers, supra, at 147.

The Supreme Court of the United States recently emphasized the need to recover and preserve evidence incident to arrest as a

value to be recognized. In Schmerber v. California, 34 Law Week 4586, decided June 20, 1966, the Supreme Court upheld the forcible removal of a blood alcohol sample from a suspect arrested upon a charge involving alcoholic influence. The invasion of the suspect's body was upheld because the removal of blood would prevent the threatened destruction of evidence (34 Law Week 4590). It is noteworthy that the opinion refers to "evidence" rather than instrumentality of crime." Of course, blood would not be an instrumentality of crime, although the alcohol in the blood might fit that classification.

In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court also emphasized the need to preserve evidence, at the time of arrest, implying that rules governing forcible entry to make arrests would not apply where there is imminent destruction of vital evidence (at p. 484).

Appellant quotes dictum in Harris v. United States, 331 U.S. 145, 154 (1947), to the effect that merely evidentiary materials may not be seized incident to an arrest. This dictum cites a number of cases, beginning with Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914); and Gouled v. United States, 255 U.S. 298 (1921). A review of these decisions demonstrates that they do not support the dictum in Harris.

Gouled relies upon Boyd and Weeks to support the proposition that a search warrant may not be issued for items that are merely evidentiary. Assuming that this statement of the law is

correct (although California Penal Code Section 1524 has authorized a search warrant for mere evidence since 1957) 10/, it does not operate to prevent a seizure of evidence as distinguished from a search for evidence.

Boyd, supra, is primarily concerned with self-incrimination upon a court order to produce private papers, etc. The decision indicates that there cannot be a search for mere evidence, but it does not answer the question of legality of seizure of evidence properly discovered during a proper search for weapons, etc.

Weeks, supra, cited in Harris, is authority supporting appellee's position herein. Contrary to the dictum in Harris, Weeks holds that officers have the right, "always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime."

Weeks, supra, at p. 392 (Emphasis added).

Weeks also refers to "burglar's tools or other proofs of guilt found upon his arrest within the control of the accused." (at p. 392, emphasis added).

In Weeks, the seizure was unreasonable because the search itself was unreasonable. The Supreme Court recently cited Weeks to support the rule that "fruits or evidences of crime" may be seized incident to a lawful arrest.

10/ This statute was recently upheld once again in People v. Potter, 49 Cal. Rptr. 892, 899 (March 7, 1966)

Schmerber, supra, 34 Law Week 4586, 4589.

An earlier decision cited Weeks and other cases to support the same general rule:

> "Property seized in connection with a lawful arrest, and which is held merely as evidence of crime, does not come within the protection of the provisions of the Constitution prohibiting search and seizure without a search warrant."

Swan v. United States, 295 Fed. 921, 922 (C. A. D. C. 1923).

F. ASSUMING, ARGUENDO, THAT THE EXHIBIT IN QUESTION WAS NOT LAWFULLY SEIZED, ANY ERROR REGARDING THE EXHIBIT WAS HARMLESS.

Assuming, arguendo, that error was committed in regard to Government Exhibit 7 for Identification, the alleged error was harmless under Rule 52(a) of the Federal Rules of Criminal Procedure.

The harmless error rule is applicable to search and seizure issues under the appropriate circumstances.

Hernandez v. United States, 353 F. 2d 624, 628 (9th Cir. 1965);

Westover v. United States, 342 F. 2d 684, 689-90 (9th Cir. 1965);

Burge v. United States, 342 F. 2d 408, 413 (9th Cir. 1965).

If it be assumed that the officers conducted a lawful search, and if it also be assumed that they had no right to seize the book in question, the evidence that was offered at the trial would still be admissible. The book was not offered or received in evidence at the trial. Had the officers left the book behind at appellant's residence, the testimony attacked by appellant would still be admissible. This testimony merely consists of Sergeant Beckmann's statements to the effect that he told appellant that the names of Restuccia and Martin Gold were in appellant's telephone book [R. T. 165-66]. Sergeant Beckmann later conceded that the book possibly belonged to appellant's wife [R. T. 167]. Appellant testified that the exhibit looked like his wife's phone book [R. T. 239]. Government counsel told the jury that it was not claimed that the book belonged to appellant [R. T. 257].

Even if the officers did not have the right to seize the book, which is not conceded, they could testify concerning knowledge lawfully obtained (i. e., that the names of Restuccia and Gold were in the book).

People v. Citrino, 46 Cal. 2d 284, 288 (1956).

Considering the small significance of "these trifling bits of evidence" (Burge, supra, at 413), it is respectfully submitted that the harmless error rule would apply in the event that any error did occur.

G. ASSUMING, ARGUENDO, THAT THE EXHIBIT IN QUESTION WAS NOT LAWFULLY SEIZED, APPELLANT HAD NO STANDING TO OBJECT.

Appellant argues that the seizure of the telephone book was unlawful. However, if it be assumed that the search was lawful, appellant has no standing to object to the seizure, as he failed to establish any interest in the property (i. e., the telephone book). On the contrary, he claimed that the book looked like his wife's phone book [R. T. 239].

> A party aggrieved by an alleged unlawful seizure must establish standing to object by claiming ownership or a substantial possessory interest.
>
> Diaz-Rosendo v. United States, 357 F. 2d 124, 130-31 (9th Cir. 1966)

While this requirement is frequently satisfied by showing an interest in the premises searched rather than the property seized, it is obvious that standing would not be established by merely claiming an interest in the premises if the premises were lawfully entered and searched.

H. ASSUMING, ARGUENDO, THAT THE EXHIBIT IN QUESTION WAS NOT LAWFULLY SEIZED, APPELLANT WAIVED THE OBJECTION BY FAILING TO MAKE A TIMELY OBJECTION.

Appellant objected at trial to the reference to the telephone book upon the ground that it was seized as a result of an unlawful entry or unlawful arrest [R. T. 176-79]. He now makes the additional objection that regardless of the legality of the search, the book was illegally seized because it allegedly was not an instrumentality or fruit of crime. This complex issue was not presented to the trial Court as an objection until appellant filed his "Points and Authorities In Support of Motion For Judgment of Acquittal or New Trial" on December 10, 1965 [C. T. 66], 17 days after the questioned testimony was heard.

An issue must be raised in timely fashion in the trial Court.

Ramirez v. United States, 294 F.2d 277, 283 (9th Cir. 1961);

Stein v. United States, 166 F.2d 851, 855 (9th Cir. 1948), cert. denied, 334 U.S. 844 (1948).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio
ROBERT L. BROSIO